Nos. 89-1433 and 89-1434

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief, we explained that in assessing the constitutionality of the Flag Protection Act of 1989, the Court should focus on the sort of expres-

sive conduct at issue—flag burning—and then take into account the national consensus underlying the Flag Protection Act—that physical destruction of or injury to the American flag constitutes an assault on the shared values that bind our national community. U.S. Br. 25-27. We agreed that appellees' flag burning constitutes expressive conduct, and that Congress enacted the Flag Protection Act in order broadly to protect the physical integrity of the flag and thus necessarily to encompass within its prohibition that narrow category of "symbolic speech"—expressive conduct that involves destruction of (or damage to) the American flag in order to convey any given message. U.S. Br. 28-29. Nonetheless, we explained that the First Amendment does not prohibit Congress from removing the American flag as a prop available to those who seek to express their own views by destroying it, since flag burning is a narrowly defined type of injurious expressive conduct that does not merit full protection under the First Amendment. U.S. Br. 30-41. Lastly, we submitted that, to the extent this Court in *Texas* v. *Johnson* accorded flag burning full First Amendment protection, that decision should be reconsidered and, upon reconsideration, appropriately limited. U.S. Br. 42-45.

Appellees and their amici, like the district courts below, principally contend that *Texas* v. *Johnson* essentially forecloses the constitutionality of the Flag Protection Act, and thus dismiss out of hand our defense of the statute. This approach is not faithful to the Court's language in *Johnson* itself. See 109 S. Ct. 2533, 2544 n.8 (1989) ("Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted."). In any event, when appellees and their amici move beyond reflexive incantation of *Johnson*, their arguments suffer from serious flaws.

1. At the outset, several hyperbolic claims raised by appellees and their amici need to be put to rest.

a. First, our submission that the Court should defer to Congress's judgment in enacting the Flag Protection Act is in no wise an assault on *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).[1] As we made plain in our opening brief, "the Court must decide, as is its duty, whether the Act is constitutional." U.S. Br. 41. On the other hand, the importance of protecting the flag of the United States from physical attack and destruction is precisely the sort of judgment that the elected branches are well suited to make, and this Court—conversely—is not. It is this legislative judgment which should inform the constitutional analysis the Court must ultimately undertake.

b. Second, the Congressional ban on physical destruction of a flag of the United States is not tantamount to the sort of compulsion in matters of conscience the Court has condemned in such decisions as *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977).[2] In those cases, the state laws at issue mandated that an individual act affirmatively in support of a belief he did not share. As the Court has explained:

> Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in

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[1] See, *e.g.*, Appellees' Br. 18-19; Strong Br. 18-19; ABA Br. 17-19; People for the American Way Br. 21-22.

[2] See, *e.g.*, Appellees' Br. 2, 19-20; ACLU Br. 24; Johns Br. 25.

> *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Wooley v. *Maynard*, 430 U.S. at 715 (quoting *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. at 642).

Here, by contrast, the Flag Protection Act scarcely compels an individual either to take an "affirmative act" regarding, or to become an "instrument" for espousing, any particular view of the American flag. Cf. *Employment Division, Dep't of Human Resources* v. *Smith*, No. 88-1213 (Apr. 17, 1990), slip op. 9. The Act does not compel anyone to do anything. Quite the contrary, the Act only proscribes certain specific forms of conduct and leaves entirely in place abundant opportunities for expressive conduct involving the flag, as well as full opportunities for individuals to engage in robust, wide-open, and uninhibited debate.[3] In other words, the Act does not intrude upon an individual's conscience by commanding any particular attitude or conduct toward the flag.

c. Finally, treating the act of physically destroying an American flag as expressive conduct falling outside the scope of "the freedom of speech" protected

[3] Appellees' amici criticize that statement as factually incorrect. See Association of Art Museum Directors Br. 26-27 n.16. But surely the Flag Protection Act permits an individual to use the flag in any number of ways (short of physical destruction or damage)—*i.e.*, by violently waving it or hanging it upside down—as part of oral or written expression of his particular political or social views.

by the First Amendment does not eviscerate that constitutional guarantee.[4] It is undisputed that the flag of the United States is the one—indeed the unique—symbol of the Nation. As this Court has intimated, see *Spence* v. *Washington*, 418 U.S. 405, 413-415 (1974), flag burning (or other forms of destruction or mutilation) is a physical, violent assault on the most deeply shared experiences of the American people. And it is precisely because the flag stands alone that members of the national community and their elected representatives seek to shield that symbol from physical assault and destruction.

The system of free expression ordained by the First Amendment is not at all compromised by the highly specific, narrowly tailored prohibition of certain forms of *conduct* with respect to the flag. Individuals, such as appellees, remain free to express their particular political and social views. On this record, there is no doubt that appellees did so without reprisal. See, *e.g.*, 89-1433 J.S. App. 2a-3a; 89-1434 J.S. App. 2a, 5a & n.3; J.A. 46-67, 74-84. And, since robust political protest survives, even though, for example, an overnight sleeping demonstration may be prohibited, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), and a citizen may not confront a local political leader with personal epithets, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), it is far-fetched to suggest that removing certain narrowly defined categories of expressive conduct from "the freedom of speech" imperils the liberties otherwise fully protected by the

[4] See, *e.g.*, Appellees' Br. 36-40; ACLU Br. 13-14; People for the American Way Br. 22-24; Association of Art Museum Directors Br. 22-27.

First Amendment. In short, appellees are crying wolf.[5] Just as the flag is *sui generis*, a recognition by this Court that Congress may protect the flag from destruction—yes, in the course of expressive conduct —would hardly be precedent for inroads on the First Amendment. This is particularly true given the inherently ambiguous message conveyed by the expressive conduct of flag burning. See J.A. 46-84 (broad and variegated range of messages sought to be conveyed through same conduct of burning the flag).

2. Appellees (Br. 12-16, 29-31) and their amici[6] argue at length that the Flag Protection Act is a content-based provision that, by definition, suppresses expression, *i.e.*, politically expressive conduct involving the flag. Congress enacted the Act in order to protect the physical integrity of the flag and preserve it as "the unique and unalloyed symbol of the Nation." S. Rep. No. 152, 101st Cong., 1st Sess. 3 (1989). As the Senate Judiciary Committee explained: "In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation." *Ibid.* The House Judiciary Committee echoed that purpose:

> [The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object.

[5] See especially People for the American Way Br. 24 n.13 ("Sustaining this statute threatens to validate a modern version of [the Alien and Sedition] laws.").

[6] See, *e.g.*, ABA Br. 10-17; ACLU Br. 15-21; Association of Art Museum Directors Br. 7-17; Johns Br. 17-20; People for the American Way Br. 9-16.

H.R. Rep. No. 231, 101st Cong., 1st Sess. 9 (1989).

In so doing, Congress necessarily sought to encompass within the prohibition a certain type of expressive conduct, namely, physical destruction of (or damage to) an American flag. But in so crafting the statute, Congress was mindful of this Court's historic caution in extending First Amendment protection to the act of physically destroying or mutilating the flag. Those cases, indeed, were featured prominently in the Congressional deliberations and debate with respect to this statute. And those cases were interpreted, and reasonably so, by Congress as leaving open the question of a viewpoint-neutral set of protections of the flag.

In *Street* v. *New York*, 394 U.S. 576, 578 (1969), Street, after learning that James Meredith had been shot, burned an American flag in protest and shouted "[w]e don't need no damn flag * * * [i]f they let that happen to Meredith." Street was convicted of violating a state law which made it a crime "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]." *Id.* at 578-579 (brackets in original). In reversing Street's conviction, the Court examined the record meticulously and determined that he may well have been convicted for his words, as opposed to the act of flag burning itself. *Id.* at 577-579, 581-585, 588-594. Accordingly, the Court made plain that the case presented "no occasion [for the Court] to pass upon the validity of [Street's] conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest." *Id.* at 594.[7]

[7] The separate dissenting opinions of four Members of the Court left no doubt that, in their view, the government could

In *Smith* v. *Goguen*, 415 U.S. 566, 566-567 (1974), Goguen wore a small cloth version of an American flag sewn on the seat of his trousers and, after walking past a police officer, was charged and convicted of violating a state law which made criminally liable "[w]hoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States," *id.* at 568. The Court invalidated that conviction, concluding that the statutory phrase "treats contemptuously" "fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not." *Id.* at 574. The Court, accordingly, held that the state law was void for vagueness. *Id.* at 582.

Nevertheless, the Court pointed out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." 415 U.S. at 581-582. Indeed, the Court cited the former federal flag desecration statute, 18 U.S.C. 700(a), as an example of such a provision, commenting that "[t]he

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constitutionally outlaw physical destruction of the flag consistently with the First Amendment. See *Street* v. *New York*, 394 U.S. at 605 (Warren, C.J., dissenting) ("[T]he States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace."); *id.* at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense."); *id.* at 615 (White, J., dissenting) ("For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction."); *ibid.* (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public.").

legislative history reveals a clear desire [by Congress] to reach only defined physical acts of desecration," 415 U.S. at 582 n.30, as opposed to generalized acts of "flag contempt." In his separate opinion, Justice White expressed "no doubt * * * that it is well within the powers of Congress * * * to protect the integrity of th[e] flag." *Id.* at 586 (concurring in the judgment). Justice Blackmun echoed that view, stating that "Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants." *Id.* at 591 (dissenting); accord *id.* at 591-604 (Rehnquist, J., joined by Burger, C.J., dissenting).

In *Spence* v. *Washington*, 418 U.S. 405, 406 (1974), Spence hung an American flag upside down from his apartment window, after taping a "peace symbol" on each side. Spence was convicted of violating a so-called state "improper use" statute, which made it a crime to "[p]lace or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag * * * of the United States." *Id.* at 407. The Court described in detail Spence's conduct in taking no action that would injure or destroy the flag he displayed, see *id.* at 406-409, 414-415, and expressly noted that Spence was not charged under the state's flag desecration statute for physically damaging the flag he owned, *id.* at 406, 415. Under those circumstances, the Court invalidated Spence's conviction, concluding that "no interest the State may have had in preserving the physical integrity of a privately owned flag was significantly impaired." *Id.* at 415.[8]

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[8] Justice Blackmun concurred in the result without writing an opinion. See 418 U.S. at 415. Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented, concluding

And, again, in *Texas* v. *Johnson*, *supra*, Johnson was convicted under a state statute that, as conceded by the State, "reache[d] only those severe acts of physical abuse of the flag carried out in a way likely to be offensive." 109 S. Ct. at 2543. In declaring that provision unconstitutional, the Court, among other things, pointed out that "[t]he Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others." *Ibid.*[9]

These various intimations—over many years—suggested to Congress that the Court itself envisioned *conduct* with respect to the flag as not entirely the same, for First Amendment purposes, as *speech* concerning the flag. In light of all these cases, Congress carefully crafted the Flag Protection Act to comply with this Court's prior expressions regarding the First Amendment's application to provisions outlawing certain conduct—the physical destruction of or damage to the flag itself—as opposed to otherwise protected speech incident to such conduct. In so doing, Congress's actions, as appellees and amici correctly pointed out, cannot be wholly divorced from the type of expressive conduct prohibited. But Congress plainly viewed the regulation of *conduct* as not outside the range of its powers consistent with the

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that the Constitution permitted the government to "withdraw[] a unique national symbol from the roster of materials that may be used as a background for communications." *Id.* at 423.

[9] In the accompanying footnote, the Court specifically referred to Justice Blackmun's dissenting opinion in *Smith* v. *Goguen*, 415 U.S. at 590-591. See *Texas* v. *Johnson*, 109 S. Ct. at 2543 n.6.

First Amendment. At the same time, Congress did not seek to suppress any particular political or moral viewpoints associated with such physical activity; nor did Congress "punish criticism of the flag, or the principles for which it stands." *Spence* v. *Washington*, 418 U.S. at 422 (Rehnquist, J., dissenting).[10] In

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[10] The courts below acknowledged that the Flag Protection Act, by its terms, makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See 89-1433 J.S. App. 13a; 89-1434 J.S. App. 10a. The Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—ensures that only such conduct, and not any protected speech associated with it, will be prosecuted. And on this record, appellees can advance no colorable claim that the government filed criminal charges based on any speech or expressive conduct other than their particular flag burning activities. Contrast *Street* v. *New York*, 394 U.S. at 577-579, 581-585, 588-594.

Nevertheless, appellees (Br. 33-35) and amici (see, *e.g.*, ACLU Br. 17; Johns Br. 19-20) claim that the statute's proscription against defilement, and express exception for disposal of a worn or soiled flag, render the statute impermissibly viewpoint-based. That claim is mistaken. First, the act of physical defilement is not the functional equivalent of an act of disrespect or dishonor. Congress has prohibited destroying or damaging a flag of the United States; it has assuredly not prohibited showing disrespect for the flag. Cf. 36 U.S.C. 176 (recommended treatment of flags). Second, the statutory exception merely recognizes a traditional and customary means of flag disposal. See 36 U.S.C. 176(k). In any event, as the House Report explained:

> As flags are ordinarily made of materials that wear out with prolonged, proper use, a strict prohibition against their destruction would require the maintenance of all flags in perpetuity.

H.R. Rep. No. 231, *supra*, at 10. Appellees and their amici make much of the statutory exception for flag disposal, but it would be a curious Constitution that would permit a ban on flag burning in the absence of such an exception, but not with one.

many respects, therefore, one contributing justification for the Flag Protection Act is Congress's aim in eliminating a substantial "secondary effect" of flag burning—what Congress aptly described a generation ago as "an injury on the entire Nation," S. Rep. No. 1287, 90th Cong., 1st Sess. [*sic*; 2d] 3 (1968). Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). This Congressional purpose underlying the Flag Protection Act—addressed only at conduct—is thus quite distinct from censorship of any particular political viewpoint or compulsion of any particular attitude toward the flag or the values for which it stands.

3. Appellees (Br. 41-42) and amici (see, *e.g.*, Johns Br. 5-14) contend that the Flag Protection Act's definition of a "flag of the United States"—"any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed," 18 U.S.C. 700(b) (as amended)—is unconstitutionally vague. On this record, it is undisputed that appellees burned flags of the United States falling under that statutory definition. See U.S. Br. 14-17. Appellees had no doubt that they were violating this Act—that was the very purpose of their self-styled "challeng[e]" to the statute and "Festival of Defiance." See J.A. 55, 79. For that reason, appellees' facial challenge must fail, since "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974).

Moreover, as this Court has explained, the void-for-vagueness doctrine requires that a statute be drafted in "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973); see *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The Flag Protection Act's definition of a flag measures up to that standard. The definition's operative term—"in a form that is commonly displayed"—shows that Congress did not extend protection to representations of flags, such as those found in decals and drawings, compare 18 U.S.C. 700(b) (1988),[11] but only to those sorts of ensigns or banners that are capable of being used as a flag in the colloquial sense, *i.e.*, displayed from a staff, draped over an object, or suspended from points above the ground. See generally 36 U.S.C. 175 (customary methods of displaying a flag of the United States). And the legislative record confirms such a "common sense" construction of the statute. See, *e.g.*, H.R. Rep. No. 231, *supra*, at 11.

Finally, appellees (Br. 43) and amici (Johns Br. 9-10) mistakenly claim that the Flag Protection Act covers any number of official or historic American flags. To the contrary, the statute's reference to "flag of the United States" necessarily incorporates the established—and well understood—definition of the flag, *i.e.*, "thirteen horizontal stripes, alternate red and white; and * * * [50] stars, white in a blue field." 4 U.S.C. 1; see 4 U.S.C. 2 (star added to union of flag on admission of a new State into the Union). That is the unique symbol of the Nation that Congress quite properly chose to protect from physical attack or mishandling.

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[11] Former Section 700(b) expressly applied to "a picture or a representation" of an American flag.

For the foregoing reasons, and those stated in our opening brief, the judgment of the district court in *United States* v. *Eichman*, No. 89-1433, and the judgment of the district court in *United States* v. *Haggerty*, No. 89-1434, should be reversed.

Respectfully submitted.

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